No. 87-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
Petitioners,

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,
Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF OF AMICI CURIAE

**SEARCH GROUP, INC.,
THE STATE OF NEW YORK,
DIVISION OF CRIMINAL JUSTICE SERVICES,
THE COMMONWEALTH OF KENTUCKY,
JUSTICE CABINET
AND UNITED STATES CONGRESSMAN
DON EDWARDS, (CHAIRMAN, SUBCOMMITTEE
ON CIVIL CONSTITUTIONAL RIGHTS,
HOUSE COMMITTEE ON THE JUDICIARY).**

IN SUPPORT OF PETITIONERS

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I. STATEMENT OF THE CASE AND SUMMARY OF AMICUS ARGUMENT

This case poses a critical criminal justice information issue. Can a criminal history record[1/] be withheld under the federal Freedom of Information Act, 5 U.S.C. § 552 (1982) ("FOIA"), on the grounds that public disclosure could reasonably be expected to constitute an unwarranted invasion of personal

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1/ We use the term "criminal history record" throughout this memorandum to refer to cumulative, name indexed records consisting of descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges and any disposition arising therefrom, as well as information relating to sentencing and correctional supervision and release. As such, this term conforms to the definition in the federal regulations that govern the operation of state and local criminal history record systems, 28 C.F.R. § 20.3(b) (1987), and the definitions found in most state criminal history record legislation. The term "rap sheet" is a synonym for criminal history record.

privacy, even though some of the component parts of the record are available to the public from the police departments and courts that originally created these component parts.

A. Statement of the Case

This case arose as a result of a FOIA request to the Federal Bureau of Investigation ("FBI") by Robert Schakne, a CBS News correspondent, and the Reporters Committee for Freedom of the Press, an association of journalists. Their request sought all records indicating arrests, indictments, acquittals, convictions, and sentences -- in other words, criminal history records -- compiled by local, state or federal law enforcement agencies or courts relating to the Medico brothers, Phillip, Charles, William and Samuel. The

Reporters Committee for Freedom of the Press and Schakne eventually limited their request to criminal history records consisting of information that was a "matter of public record."

The FBI partially denied the request on the grounds that the records sought were exempt from disclosure under the FOIA exemptions at 5 U.S.C. § 552(b)(3) (1982) [covering records that are made specifically exempt from disclosure by other statutes];[2/] 5 U.S.C. § 552(b)(6) (1982) ["Exemption 6"] [covering various kinds of personal records, the disclosure of which would constitute a clearly unwarranted invasion of privacy], and

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2/ The FBI's claim with respect to the applicability of the exemption at 5 U.S.C. § 552(b)(3) (1982) has not been pursued in the Supreme Court.

5 U.S.C. § 552(b)(7)(C) (1982) ["Exemption 7(C)] [covering law enforcement records that could reasonably be expected to constitute an unwarranted invasion of privacy].

The district court upheld the FBI's partial denial, in part on the grounds that release could reasonably be expected to constitute an unwarranted invasion of personal privacy. The United States Court of Appeals for the District of Columbia Circuit, in two separate opinions, reversed.

The court of appeals' first opinion noted that when a federal agency seeks to withhold law enforcement records under Exemption 7(C), the agency must balance the record subject's privacy interest against the public interest in disclosure. Reporters Committee for

Freedom of the Press v. United States Department of Justice, 816 F.2d 730, 737 (D.C. Cir. 1987). In calculating the privacy interest, the court concluded that if "a state legislature requires arrests and convictions to be recorded made freely available by the primary source to the general public, any privacy interest in those records seems insignificant." Id. at 740. The court of appeals remanded the case to the district court to determine if applicable law or policy made the component parts of the records available to the public at their source.

The Department of Justice and the FBI sought a rehearing of the court of appeals' Exemption 6 and 7(C) determinations. SEARCH Group, Inc. and agencies of the states of New York and California filed an amicus petition

in support of the petition for rehearing. Upon review,a majority of the court of appeals panel reaffirmed its initial holding but changed, at least in part, the rationale for the holding. Judge Starr, on the other hand, voted to grant a rehearing and dissented from the majority decision.

On the privacy side of its analysis, the majority held in its second opinion that state law with respect to the disclosure of criminal history records, and presumably original records of entry, was irrelevant. Instead, the majority directed the district court to make a "factual determination" of whether information about arrests and convictions reflected in the criminal history record had previously appeared on the public record -- presumably at their primary source. As the

majority now saw it, if the information in question was available from primary sources, then the privacy interest would "fade" and whatever privacy interest remained would be "slight." This slight privacy interest could outweigh the public's interest in disclosure only if it could be shown that some specific and presumably significant harm would arise from disclosure. Reporters Committee for Freedom of the Press v. United States Department of Justice, 831 F.2d 1124, 1126-7 (D.C. Cir. 1987). (Hereafter, the first and second opinions are sometimes collectively referred to as "Reporters.")

Judge Starr dissented on a number of grounds. In particular, his dissent recognized that the privacy risk posed by the public disclosure of a computerized

compilation of criminal history data is very different from the risk posed by disclosure of original source records. Accordingly, Judge Starr concluded that whether records are available at their source is irrelevant to a determination of whether disclosure of criminal history records would be likely to result in an unwarranted invasion of privacy.

> As I see it, computerized data banks of the sort involved here present issues considerably more difficult than andcertainly very different from a case involving the source records themselves. Id. at 1128.

B. Summary of Amicus Argument

The Amicus parties assert that the majority below failed to take the proper considerations into account in identifying the

privacy interests at stake when criminal history records are sought under the FOIA.

First, the court of appeals should have evaluated whether, as a practical matter, criminal history records are, in fact, on the public record merely because some of their component parts are publicly available at their source. The court of appeals would have found that as a practical matter, members of the public cannot assemble a criminal history record from primary source records because to do so is too expensive, too time consuming and simply too difficult. Accordingly, the fact that many of the component parts of a criminal history record theoretically are available, separately and individually, from primary sources does not eviscerate a record subject's privacy interest.

Second, the court of appeals should have evaluated whether as a policy matter, criminal history records are on the public record. The court of appeals would have found that, as a matter of state law, state and local rap sheets are not placed on the public record. Statute law and regulations in all but a handful of states, make criminal history records, and particularly the nonconviction record[3/] component of criminal history records, unavailable to the public, even while making many of the component parts of the

3/ We use the term "nonconviction records" to refer to a record of an arrest without a disposition if more than one year has elapsed from the arrest and no active prosection is pending as well as information indicating that a prosecutor has dropped charges and all other dismissals and, as well, all acquittals. As such, this term conforms to the definition in the federal regulations at 28 C.F.R. § 20.3(k) (1987).

record available to the public from source documents.

Finally, the majority below, in weighing the privacy interest against the public's interest in disclosure, should have taken into account the same considerations that have led legislatures in almost every state to conclude that criminal history records should be confidential -- namely, that the public release of criminal history records, (more so than the release of original record of entry data) generally results in serious harm to privacy interests. These harms include: (1) the risk that release of a comprehensive, detailed and often times dated record of an individual's criminal conduct may cause greater damage to an individual's reputation and privacy than the release of merely a piece

of the total record; (2) the risk that the criminal history records maintained by the FBI, being merely compilations from many secondary sources, may contain inaccurate and incomplete information; and (3) the risk that release of criminal history records to any person for any purpose on the basis of a "name only" inquiry may result in the release of information about the wrong individual.

II. STATEMENT OF INTEREST

A. Identification of Amicus Parties

The Amicus parties are identified in some detail in Appendix B. The Amicus parties consist of a not-for-profit organization comprised of Governors' appointees from all

fifty states, who in most states are responsible for the operation of their states' criminal history record repository; agencies of the states of New York and Kentucky that are responsible for operating their states' criminal history record repositories; and a member of Congress who chairs a subcommittee with oversight responsibility for the FBI's handling of criminal history records.

B. The Amicus Parties Have a Critical Stake in the Outcome of the Reporters Case

The Reporters' opinions, if allowed to stand, would require federal agencies to disclose state and local criminal history records in a manner contrary to the Amicus

parties' standards and laws.4/ In addition, the opinions, if allowed to stand, could have profound and adverse consequences upon the established system under which state criminal history record repositories share criminal history record information with the FBI.

State criminal justice agencies, usually the state's criminal history record repository, transmit felony and certain misdemeanor arrest and conviction information to the FBI as required by state law or policy.

4/ SEARCH has adopted model standards for state legislation governing the collection, maintenance, use and confidentiality of criminal history records. SEARCH's standards do not apply to chronologically arranged non-name indexed original records of entry. SEARCH's confidentiality standards call upon the states to protect criminal history records, and particularly non-conviction record information, from access by the press and the public. SEARCH, Technical Report No. 13, Standards for Security and Privacy of Criminal Justice Information (1978).

In a few states the FBI also obtains criminal history record information directly from local law enforcement agencies. Once obtained, this information is maintained by the FBI's Identification Division. At present, the Identification Division's database is the only national criminal history record database. However, the FBI and the states are currently testing a decentralized system for the interstate exchange of criminal history records. This system, called the Interstate Identification Index ("III"), consists of a computerized index at the FBI containing only personal identification data about individuals, including the individuals' fingerprint records, and an identification of the state or states (or the FBI, for federal offenders) maintaining a criminal history record about the individual. The III will

serve as a pointer to refer authorized requestors to the state or federal files where a complete criminal history record about the inquired upon individual is maintained.

It is likely that if the Reporters decision stands, many states would be compelled to reconsider the amount or nature of criminal history record information that they presently share with the FBI. In addition, many states may have to consider terminating their participation in the III. States and criminal history record repositories which failed to curtail their information sharing relationship with the FBI would be placed in the unenviable position of facilitating the circumvention of the confidentiality strictures in their own state law.

III. ARGUMENT

A. Criminal History Records Are Not on the Public Record

In its first opinion, the court of appeals reasoned that if criminal history record information was truly "on the public record" then the record subject's privacy interest, while not eliminated entirely, would be weakened considerably and the privacy interest/public interest balance affected accordingly. 816 F.2d at 739. However, the court of appeals explained that by using the term public record it meant that a more or less formal policy determination had been made that the information in question should be publicly available and that a mechanism be in place to accomplish this availability.

> The phrase 'public record' implies, we believe, a good deal more than that the information be available. It means that a local, state or federal political body has made an affirmative determination that criminal records must be freely available to the general public and has provided a mechanism to ensure the implementation of that policy. Id. at 740.

The court of appeals abandoned this standard in its second opinion. Instead, the majority concluded that official law and policy with respect to disclosure is irrelevant and, rather, the only germane determination is whether as a "factual matter" the information is available. 831 F.2d at 1127.

We think that the court of appeals came closer the first time to identifying the considerations relevant to whether records submitted to federal agencies have previously been placed on the public record. As discussed below, other courts that have considered the effect of a prior release on an agency's entitlement under FOIA to withhold previously released data have found that the key question is whether there has been an official determination to release the data. Moreover, in assessing whether information is in fact available, it is surely relevant whether there is a mechanism in place that works effectively to make the information in question available. With respect to criminal history records, there is neither an effective mechanism to make the records publicly

available nor an official policy in support of public availability.

1. As a Practical Matter, Criminal History Records Are Not on the Public Record

The majority below seemed to assume that if original source records are publicly available by law then it follows that a requestor can obtain criminal history records merely by going to the original source for the information. In fact, nothing could be further from the truth.

Rap sheets maintained by state criminal history record repositories may consist of entries describing numerous arrests made over several years by law enforcement agencies in

many different jurisdictions and states. Rap sheets may also include information about charges filed by prosecutors in many different jurisdictions and states. Rap sheets may further contain dispositions relating to these various arrests and charges, and describing adjudicatory actions over several years, in different courts and in different jurisdictions and states. Finally, rap sheets may include correctional information that provides an historical account of correctional events stretching over several years and including entries from correctional agencies in different jurisdictions and states.5/

5/ An example of the contents of an FBI rap sheet is found in SEARCH, Technical Report No. 14, The American Criminal History Record: Present Status and Future Requirements (1976), at 4.

Original source documents are different. For one thing, not all of the types of information included in a rap sheet are publicly available from their original sources. For example, correctional information customarily is not publicly available from the jail or correctional institution that is the source of the data. Similarly, charging information is generally not publicly available from the prosecutorial agency that is the source of the data.

Two types of primary source documents -- sometimes called original record of entry documents -- are customarily available to the public. First, virtually every police department keeps a daily record of arrests and other events involving police action. The title and character of these records varies

some from department to department, but usually these records include a blotter or log of calls to the department for assistance; incident or offense reports filed by police officers responding to these calls; and an arrest log or blotter identifying those individuals arrested or formally detained at the station house, along with a brief description of the reason for the arrest or detention.6/

These daily records often are not available to the public by the names of record subjects and seldom, if ever, are available to the public on a cumulative basis -- i.e., the daily records do not contain or cross reference all of an individual's arrests or

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6/ SEARCH, Privacy and Security of Criminal History Information: Privacy and the Media, Bureau of Justice Statistics (1979) at 17.

encounters with a particular police department. Rather, to obtain an individual's total record of encounters with a particular agency each day's record would have to be searched. By statute or case law in most states, and by tradition in every state, the chronological version of these daily blotters and logs are available to the public.7/

Second, every court keeps a record, usually called a docket, of events occurring in that court. The docket includes records of arraignments, adjudications, sentences, and other judicial events. Customarily, these

7/ Heard v. Houston Post Co., 684 S.W.2d 210, 212 (Tex. 1984), is representative of the decisions that have dealt with the availability of police blotter data. In Heard, a Texas state appellate court held that under Texas' Open Records Law, most parts of a police offense report must be made available to the public and the press. See also, for example, Cal. Gov't Code § 6254(f).

records are indexed, or at least cross indexed, by the names of the parties. Occasionally, these records are cumulative, i.e., all of the events in a given court, even events involving different cases, in which a particular individual participated can be obtained by searching under that individual's name.8/ Moreover, increasingly, courts are automating their docket systems. However, even with respect to the most advanced court docket systems, access to the system merely provides a requestor with information about events that occurred in that court -- not in other courts. As a matter of constitutional

8/ SEARCH Report, National Conference on Data Quality and Criminal History Records: Strategies for Improvement, Proceedings of a BJS/SEARCH Conference (Nov. 1986) at 23, 30 and 42; and Polansky "Computer Technology in the Courts," Legal and Legislative Information Processing, Greenwood Press (1980), at 201-5.

right, statute law or court rule, dockets are open to public inspection in every state.9/

Indeed, even getting this one limited "piece of the puzzle" is something of an accomplishment. A requestor must know (or guess correctly) that the record subject in question has had contact with a particular police department or court. Moreover, if the police department or court does not compile its original source documents by name, or does not cross-index by name, (as is often the case) then the requestor must not only know the name of the record subject and the agency that is likely to be maintaining a source document, but the requestor must also know the date on which the event occurred or the docket

9/ See, for example, Cal. Gov't Code, §§ 69842-69847 (Superior Courts) and §§ 71280.1-71280.3 (Municipal Courts).

or offense number under which the entry is filed.

Thus, when the court of appeals' majority directed the district court to make a "factual determination" whether information in a rap sheet is available from original source documents, they posed a specious question. 831 F.2d 1124, 1127. There is no "factual determination" that a district court need make with respect to whether the various pieces of information in a rap sheet are available to the public at their original sources. The answer to this question, in virtually every jurisdiction in the country, is that some, but by no means all of the types of information in a criminal history record, are indeed publicly available from original sources

However, this answer fails to address the real issue -- does the availability of such information from various original sources make any difference from a privacy standpoint? Does such availability really mean that an individual's privacy interest, in any meaningful sense, has faded? The answer, most surely, is no. In the real world, criminal history records are not on the public record even though, theoretically, some of the component parts of the record are publicly available from original sources.10/

10/ In Washington Post Co. v. United States Department of State, 647 F.2d 197, 200 (D.C. Cir. 1981) (Lumbard, J. concurring), rev'd on other grounds, 456 U.S. 595 (1982), the concurring opinion argued that in determining whether a "public record" is available under FOIA, courts should take into account the fact that the information in question is difficult to obtain.

2. As a Policy Matter, Criminal History Records Are Not on the Public Record

Not only are state and local criminal history records unavailable as a practical matter, these records are also unavailable as a matter of state law. The court of appeals' first opinion reasoned that a determination of whether records have been placed on the public record turns primarily on whether the relevant law affirmatively places the records on the public record. Other courts have reached the same conclusion.11/

11/ In Safeway Stores Incorporated v. Federal Trade Commission, 428 F. Supp. 346, 347 (D.D.C. 1977), Judge Gesell held that the Federal Trade Commission could withhold an agency report under an applicable FOIA exemption even though the report had possibly been leaked to the Washington Post.

Publication by the Washington Post was

(footnote continued)

In the instant case, state and local agencies have not placed criminal history records on the public record because the law and regulations that control their handling of

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(footnote continued from previous page)
unauthorized by the Commission and any staff disclosure, if it occurred, was prohibited under 15 U.S.C. § 50. A close reading of the Washington Post article, moreover, raises considerable doubt that the Post ever had full access to the report. In any event, an unauthorized "leak" does not constitute a waiver of the (b)(5) exemption. Id. at 347.

See also, Murphy v. Dept. of the Army, 613 F.2d 1151, 1155 (D.C. Cir. 1979), (holding that an exemption can be asserted under FOIA even though the record had been disclosed to Congress because the applicable law authorizes such disclosure). Laborers' Internat'l Union of North America v. United States Dep't of Justice, 578 F. Supp. 52, 58 (D.D.C. 1983) (holding that an unauthorized leak of an agency report does not prevent the agency from withholding the report under Exemption 7(C)); Murphy v. Federal Bureau of Investigation, 490 (footnote continued)

criminal history records make such records unavailable to the public. Indeed, from the very outset, policy makers, legislatures and the courts have recognized what seems to have escaped the court of appeals' majority -- that criminal history records and original records of entry are very different types of records that serve very different purposes.

Unquestionably, the public has a legitimate interest in individuals who are arrested or indicted, and a right of access to information concerning crime in the community. Branzburg v. Hayes, 408 U.S. 665, 695 (1972); Houston Chronicle Publishing Company v. City of Houston, 531 S.W. 2d 177, 186, 187 (Tex.

(footnote continued from previous page)
F. Supp. 1138, 1143 (D.D.C. 1980), (holding that leaks of an ABSCAM report do not affect the FBI's entitlement to withhold records under Exemption 7).

Civ. App. 1975) application for writ of error refused, 536 S.W. 2d 559 (Tex. 1976); Tennessean Newspaper, Inc. v. Levi, 403 F. Supp. 1318, 1321 (M.D. Tenn. 1975). In recognition of this interest, police blotter records and, particularly court docket records, historically have been public in the United States. Their public status is intended to guard against secret arrests and "star chamber" proceedings, and to ensure that the public is informed as to the nature of criminal proceedings, usually through the press.12/

By contrast, criminal history record systems were created by police agencies to serve law enforcement and other criminal

12/ SEARCH, Technical Report No. 13, supra, note 4.

justice purposes. Until the mid to late 19th century, criminal history record "systems" in the United States consisted of little more than random and informal notes kept by police officers in a few urban centers.13/ By the early 20th century law enforcement agencies had begun to compile criminal history records in a more formal way and maintain these records in connection with fingerprint and other identification data.14/

These early criminal history records were viewed as the property indeed, in a sense, as

13/ Office of Technology Assessment, An Assessment of Alternatives for a National Computerized Criminal History System, (1981) at 21 (hereafter "OTA Study").

14/ SEARCH, Criminal Justice Information Policy: Intelligence and Investigative Records, Bureau of Justice Statistics (1985) at 16-17; Laudon, Dossier Society, Columbia Univ. Press (1986) at 32-36, (hereafter "Laudon").

the "personal notes", of police officers and their agencies. Accordingly, decisions to create such records; maintain such records; use such records; or disclose such records, were regarded, more or less exclusively as matters of police discretion. Well into the mid-1960s, criminal history records in most states were exempt from open record or official record laws. A 1971 survey found that, in general, arrest records were disclosed or, more often, withheld solely at police discretion.

> Courts usually refuse to interfere with the police practice of limiting public access to arrest records but circulating the records at their discretion.15/

15/ "Retention and dissemination of arrest records: Judicial Response," 38 U. Chi. L. Rev. 850, 863 (1971).

Early court challenges to police departments' selective release of criminal history records were rebuffed on the grounds that the records were not confidential at common law or by statute.16/

By the late 1960s and early 1970s the exercise of police discretion selectively to disclose criminal history record information outside of the criminal justice system was under attack. The basis for the attack included concerns about the computerization of criminal history record information; the potential for misuse of the records by non-

16/ Norman v. City of Las Vegas, 177 P.2d 442, 445-8 (Nev. 1947), (upholding the selective release of criminal history data to employers); and Hoag v. Superior Court, 24 Cal. Rptr. 659, 665 (Cal. Dist. Ct. App. 1962), (rejecting a claim that a police officer's public display of photographs of individuals with convictions and arrest records was an invasion of privacy.)

criminal justice recipients; the poor quality of the records; and the unfairness to record subjects arising from selective release of criminal history and especially nonconviction data. These concerns created a climate in which selective, discretionary release of criminal history records was politically unacceptable.17/ Indeed, as early as July 1970, Project SEARCH, the predecessor to SEARCH, published a report calling attention to the emergence of formal and automated criminal history record systems and the threat that such systems pose to personal privacy.18/

17/ Marchand, The Politics of Privacy, Computers and Criminal Justice Records, Information Resource Press (1980) at 148-150; Report of the Secretary's Advisory Committee on Automated Personal Data Systems, U.S. Dept. of Health, Education and Welfare, Records, Computers and the Rights of Citizens (1973), at 222-243.

18/ SEARCH, Technical Report No. 2, Security
(footnote continued)

In 1973, Congress took an initial step toward assuring that criminal history records maintained in state and local information systems would be unavailable to the public. The Crime Control Act of 1973 required that criminal history records in state and local information systems that received federal monies [and by then virtually all state and most large, local systems had received federal monies through the Law Enforcement Assistance Administration ("LEAA") "only be used for law enforcement and criminal justice and other lawful purposes."19/

(footnote continued from previous page)
and Privacy Considerations in Criminal History Information Systems, (1970).

19/ Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789(b)(1982), as amended by § 524(b) of the Crime Control Act of 1973, Pub. L. No. 93-83, 87 Stat. 197 (1973).

In 1976, the LEAA issued implementing regulations.20/ Importantly, the federal regulations do not apply to original records of entry, such as police blotters, if maintained on a chronological basis, nor to court records of public judicial proceedings or published court opinions.21/ Instead, they apply only to name indexed, cumulative criminal history records. The regulations require state and local agencies to withhold from the public arrest records without dispositions, if more than a year has elapsed since the date of arrest and the record does not indicate that the case is actively pending, and all types of dispositions favorable to the record subject, such as

20/ 28 C.F.R. Part 20 (1987).

21/ 28 C.F.R. § 20.20(b)(3), (4) (1987).

dismissals and acquittals, unless state law provides otherwise.22/

Today, every state but three, makes a sharp distinction in disclosure policy between criminal history records and original records of entry. Only Florida, Wisconsin and Oklahoma make criminal history records freely available to the public and, even then, criminal history records obtained by criminal history record repositories in these states from out-of-state sources are unavailable to the general public.23/

Criminal history record statutes in the other 47 states base their dissemination

22/ 28 C.F.R. § 20.21(b)(1)(2) (1987).

23/ Fla. Stat. Ann. §§ 1109, 943.053; Wis. Stat. Ann. § 1935; and Okla. Stat. Ann., Tit. 51, § 24A8.

policy on whether the criminal history data is conviction or nonconviction data. Conviction data, although generally unavailable to the public, is often available to governmental non-criminal justice agencies and even private employers. In general, conviction data is far more available outside the criminal justice system than is nonconviction data.[24] By contrast, in all 47 states nonconviction data cannot be disclosed at all for noncriminal justice purposes, or may be disclosed only in narrowly defined circumstances, for specified purposes.[25]

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[24] See, for example, Ga. Code, §§ 35-3-34, 35-3-35; Hawaii Rev. Stat. Ann. § 846-9; Me. Rev. Stat. Ann. § 16-615; Mo. Rev. Stat. § 610.120; Neb. Rev. Stat. §§ 29-3520, 3523; Ore. Rev. Stat. § 181.560.

[25] See, for example, Conn. Gen. Stat. Ann. § 54-142n; Ga. Code Ann. §§ 35-3-34, 35-3-35; Hawaii Rev. Stat. Ann. § 846-9; Me. Rev. Stat. Ann. § 16-615; Neb. Rev. Stat. § 29-3523.

These specified noncriminal justice purposes may include licensing or public or private employment screening, but in many cases only if the requestor can cite separate legal authority to obtain and use the records, such as a licensing statute.[26] Often this supporting legal authority must be "express" or "specific"[27] or must refer to criminal conduct or to criminal records and must set out requirements, exclusions or limitations based upon such conduct or records.[28] As a further limitation, statutes in some states

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[26] Del. Code Ann. § 11-8513(b)(1); Hawaii Rev. Stat. Ann. § 846-9(5); Ill. Stat. Ann. § 38-206-7; Ind. Stat. Ann. § 5-2-5-5; N.C. Gen. Stat. § 114-19.1.

[27] Ariz. Rev. Stat. Ann. § 41-1750.G; Ark. Stat. Ann. § 5-1102; Me. Rev. Stat. Ann. § 16-613.

[28] Conn. Gen. Stat. Ann. § 54-142n; Ill. Stat. Ann. § 38-206-7; Pa. Cons. Stat. Ann. §§ 18-9124, 9125; Va. Code Ann. § 19.2-389.A (ii), (vii).

provide that criminal history records may be released for licensing or employment purposes only for occupations involving the public safety or the custody of children or valuable property or information.29/

In still other states, the statute delegates the authority to release criminal history records for noncriminal justice purposes to a designated official or board.30/ Surveys undertaken by SEARCH reveal that policies adopted by these officials or boards, pursuant to statutory authority, typically permit the release only of conviction records for noncriminal justice purposes and require applicants to show a need for the information

29/ Ga. Code 1981 § 35-3-34, 35; Wash. Rev. Code Ann. § 43.43.815.

30/ Md. Ann. Code of 1957, § 27-546; S.D. Cod. Laws Ann. § 23-6-14.

based upon separate legislative authority, executive order or court order.31/

The courts, like the legislatures, have also distinguished sharply between criminal history records and original records of entry. In Houston Chronicle Publishing Co. v. City of Houston, 531 S.W. 2d 177, 186-7 (Tex. Ct. App. 1975), for example, a Texas state court ruled that the public has a First Amendment right of access to certain chronologically arranged factual data, such as that contained in a police blotter and the first page of an offense report, insofar as it supplies basic

31/ SEARCH, A Study to Identify Criminal Justice Information Law, Policy and Management Practices Needed to Accommodate Access to and Use of the Interstate Identification System for Noncriminal Justice Purposes, Federal Bureau of Investigation, National Crime Information Center (1984) (hereafter "FBI Study").

information about an arrest.32/ However, the court denied public access to a record subject's rap sheet, noting that the access rights must be balanced against other competing interests, including the interest in privacy.

> The constitutionally protected access of the press and public to the limited Offense Report, as described herein, should be made immediately available at a convenient 'central location' to meet the need

32/ In Holcombe v. State, 200 So. 739, 746 (Ala. 1941), the Alabama Supreme Court held that jail dockets and records which contain information describing each prisoner received into a local jail, their age, sex, identifying characteristics, and the charge or offense are public records and could be inspected by a newspaper reporter. In Dayton Newspaper Inc. v. City of Dayton, 341 N.E.2d 576, 578 (Ohio 1976), the Ohio Supreme Court held that a city jail log, which listed arrest numbers, names of prisoners, charges, dates, times, and dispositions was a public record and must be disclosed to a newspaper.

> of the public's right to know.
>
> The Personal History and Arrest Record is an entirely different matter. This record, or 'rap sheet', consists of the criminal history of the individual, insofar as it shows each previous arrest and other data relating to the individual and the crimes he has been suspected of committing.
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> * * *
>
> A holding that the Personal History and Arrest Record must be open to inspection by the press and public would contain the potential for massive and unjustified damage to the individual. Id. at 187-88.

Similarly, in New Bedford Standard-Times Publishing Co. v. Clerk of the Third District Court of Bristol, 387 N.E.2d 110, 116 (Mass. 1979), the Supreme Judicial Court of

Massachusetts upheld a statutory scheme which made the courts' chronological record of criminal proceedings publicly available but which made the courts' alphabetical name index of such proceedings confidential.

> It is clear enough that most court records do not aggregate information concerning the criminal history of an individual, and therefore do not threaten the privacy interests the Act seeks to protect. The alphabetical index, on the other hand, listing offenses charged and dispositions for each individual, provides aggregated information similar to that regulated by the Act. It is therefore appropriately subjected to limitation to reinforce the regulation of CORI. It has not been shown that the limitation in question exceeds permissible limits or invades any constitutional

> right of the plaintiff. Id. at 176.

B. Public Availability of Criminal History Records Threatens Significant Privacy Interests

As discussed above, we believe that the majority in Reporters erred because it failed to recognize that criminal history records are not on the public record, both as a matter of administrative practice and as a matter of applicable law. In addition, we believe that the majority erred because it failed to appreciate that even if all of the component parts of a criminal history record were effectively available to the public -- which they most certainly are not -- the damage to a record subject's privacy interest from release of a criminal history record is different from

and more serious than the damage to a record subject's privacy interest from release of any one or more of the original records of entry. The availability of original records of entry is not, as the majority implies, "tantamount" to making criminal history records available. 831 F.2d at 1127.

The majority resisted engaging in an analysis of the privacy threat posed by release of criminal history records on the grounds that the Congress, unlike state legislatures, has not adopted legislation expressly making criminal history records confidential. Id. at 1127. However, the courts' obligation under Exemption 7(C) to weigh the privacy interest in confidentiality against the public interest in disclosure is precisely the process that has led state

legislatures to conclude that criminal history records, unlike original records of entry, must be confidential.

In this regard three considerations are especially relevant: (1) disclosure of a criminal history record is more intrusive than disclosure of one or more source documents because a criminal history record provides a comprehensive and detailed history of an individual's criminal career that may often include references to old and no longer timely events; (2) release of criminal history records held by the FBI is more likely to harm record subjects than release of source documents because the FBI's criminal history records are a compilation of many different pieces of data from many different sources, and are therefore more likely than original

source documents to be inaccurate or incomplete; and (3) a request for a criminal history record based merely on the name of the record subject is more likely to result in the disclosure of information about the wrong person than is a request for an original record of entry.

The courts have long recognized that one of the interests protected by privacy is an individual's interest in avoiding the public disclosure of a comprehensive and detailed profile of the individual's activities.33/ A

33/ For example, in Doe v. Webster, 606 F.2d 1226, 1238, 1239 n. 49 (D.C. Cir. 1979) the D.C. Circuit cited several federal court opinions in which the systematic recordation and dissemination of information about individuals was found be implicate privacy interests. The court concluded "Partly for these reasons, the need to restrict the dissemination of criminal records is becoming more and more recognized." Id.

criminal history record provides precisly this kind of comprehensive and detailed picture of an individual's activities in the criminal sphere. If an individual's criminal history record is placed in the public domain, an individual's entire life with respect to contact with the criminal justice system is available for inspection by business associates, neighbors, or any member of the public on the basis of nothing more than mere curiosity. By contrast, original source documents disclose merely one isolated event relating to an individual's contacts with the criminal justice system. Accordingly, release of criminal history data, as opposed to release of an original record of entry, presents a far more serious threat to an

individual's interest in protecting his privacy.34/

Disclosure of a criminal history record also entails an increased risk of disclosing records which relate to "old" arrests or other "old" criminal justice events. By contrast, there is less risk of obtaining an aged entry from an original record of entry because the requestor must know the date or at least the period of time in which the underlying event occurred, and the entry must still be retrievable.

Public disclosure of old criminal history data implicates privacy interests because such data is unlikely to be reflective of the individual's current character or conduct. Empirical research, for example, indicates that records of an old arrests or convictions are not likely to be reflective of an individual's character or conduct.35/

34/ In United States Department of State v. The Washington Post Comapny, 456 U.S. 595, 602 n.5 (1982), this Court held that the State Department's disclosure under FOIA of records indicating that certain Iranian nationals held United States passports might implicate the privacy interests protected by Exemption 6. This Court reached this conclusion notwithstanding the fact that citizenship information is a matter of public record. One lesson from the Court's analysis in Washington Post is that even non-intimate, public record information may present a threat to privacy when combined with other pieces of information.

See also, Fiumara v. Higgins, 572 F. Supp. 1093, 1109 (D.N.H. 1983), in which a federal district court upheld the use of Exemption 7(C) to withhold criminal history records.

35/ A Bureau of Justice Statistics report found that most recidivism, "occur[s] within the first three years after release: an estimated 60 percent of those who will return to prison within 20 years do so by the end of the third year." Bureau of Justice Statistics Special Report: Examining Recidivism (February, 1985) at 1-2. A 1988 (footnote continued)

In evaluating the extent to which individuals have a privacy interest in criminal history records, the courts have been sensitive to the special privacy threat posed by old records.

In Woolston v. Readers Digest, 443 U.S. 157, 168 (1979), for example, this Court held that after 20 years an individual is no longer a public figure by virtue of a conviction record.

(footnote continued from previous page)
study by the Massachusetts Department of Corrections similarly found that recent conviction information has a strong predictive value with respect to future criminality but that older criminal history record information has virtually no predictive value. Massachusetts Department of Corrections, Statistical Tables Describing the Background Characteristics and Recidivism Rates for Releases From Massachusetts Correctional Institutions During 1985, (1988) at 7-9.

> This reasoning leaves us to reject the further contention that . . . any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on the limited range of issues relating to his conviction.
>
> * * *
>
> To hold otherwise would create an 'open season' for all who sought to defame persons convicted of a crime. Id. at 168.

In Natwig v. Webster, 562 F. Supp. 225, 231 (D.R.I. 1983), a federal district court ordered the purging of a 15 year old arrest record, in part on the grounds that the record subject had been free of involvement with the criminal justice system since his arrest, and the record therefore was no longer reflective of his character.

Similarly, in Briscoe v. Readers Digest Association, 93 Cal. Rptr. 866, 873-4 (1971) the California Supreme Court upheld an invasion of privacy claim against Readers Digest for publishing an article that revealed that eleven years earlier the plaintiff had been convicted for the hijacking of a truck. The court reasoned:

> [i]t would be a crass legal fiction to assert that a man once public never becomes private again . . . .
>
> Plaintiff is a man whose last offense took place 11 years before, who has paid his debt to society, who has friends and an 11 year old daughter who are unaware of his early life -- a man who assumed a position in "respectable society." Id. at 873-74.

The second factor that makes the public availability of criminal history records under FOIA, as opposed to the public availability of original records of entry, a far more serious privacy threat relates to the nature of criminal history records maintained by the FBI.

Low disposition reporting rates at the FBI are widely conceded to be a problem. Studies of the rate of disposition reporting to the Identification Division indicate a very substantial shortfall. For example, a 1980 study by the Jet Propulsion Laboratory, undertaken for the FBI, found that the Identification Division received dispositions for only about 45 percent of reported

arrests.[36] A report by the Office of Technology Assessment also found problems. According to OTA, approximatley 30 percent of the Identification Division's arrest entries as of 1980 lacked available court dispositions.[37] Some of the research conducted for OTA's 1980 survey, but not published as part of the OTA report, found even lower disposition reporting rates in the range of 60 percent of arrest entries without available court dispositions.[38] Further, a SEARCH/Bureau of Justice Statistics conference involving repository directors, court administrators, congressional officials, and

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36/ Jet Propulsion Laboratory, FBI Fingerprint Identification Automation Study; AIDS III Evaluation Report, Volume 5; Environmental Analysis unpublished monograph (Nov. 15, 1980), at A-3.

37/ OTA Study, supra note 13 at 92.

38/ Laudon, supra note 14 at 137.

FBI officials, held in September of 1984, heard reports that the Identification Division's disposition reporting problem is more severe than many surveys indicate and that perhaps over 50 percent of available dispositions do not get reported to the FBI.[39] Further, the OTA Study compared the information in the FBI's criminal history records with information from the original source documents on which the criminal history record entries were based and found that approximately 20 percent of the FBI entries contained material inaccuracies.[40]

39/ SEARCH, Criminal Justice Information Policy: Data Quality of Criminal History Records (1985) at 23-24.

40/ OTA Study supra note 13 at 91.

By contrast, original records of entry are created by the very agency that is repsonsible for the event described in the entry. Accordingly, most experts believe that original records of entry are more likely than criminal history records to contain an accurate description of an event. Moreover, an original record of entry does not purport to be complete and, accordingly, does not require the reporting of available dispositions. For these reasons, release of FBI held criminal history records to the public entails a greater risk of disclosing inaccurate or incomplete information than does the release of original records of entry. Courts have found that the government's release of inaccurate or incomplete personal

information involves a serious threat to an individual's privacy interests.41/

41/ For example, in Tarlton v. Saxbe, 507 F.2d 1116, 1124 n.23 (D.C. Cir. 1974), the D.C. Circuit stated:

> government collection and dissemination of inaccurate criminal information without reasonable precautions to ensure accuracy could induce a leveling conformity inconsistent with the diversity of ideas and manners which has traditionally characterized our national life and found legal protection in the First Amendment . . . .

And see, Sullivan v. Murphy, 478 F.2d 938, 965, cert. denied, 414 U.S. 880, (1973); United States v. McLeod, 385 F.2d 734, 750 (5th Cir. 1967); Wilson v. Webster, 467 F.2d 1282, 1284 (9th Cir. 1972); Bilick v. Dudley, 356 F.Supp. 945, 952-3 (S.D.N.Y. 1973); Kowall v. United States, 53 F.R.D. 211, 214-5 (W.D. Mich. 1971); Wheeler v. Goodman, 298 F.Supp. 935, 942 (W.D.N.C. 1969); Hughes v. Rizzo, 282 F.Supp. 881, 885 (E.D. Pa. 1968).

A third privacy threat posed by the public release of criminal history records is the increased risk that the records that are released will not relate to the subject of the request. The release of a wrong record may do serious and inappropriate harm to both the subject of the request and the subject of the record. Under the majority's opinion, it seems likely that federal agencies would be required to provide criminal history records to the public solely on the basis of a record subject's name, and without benefit of a record subject's fingerprints, or even biographical data or other descriptions.

Studies show that when agencies attempt to obtain criminal history records on the basis of "name only" information agencies sometimes retrieve records that do not relate

to the individual who is, in fact, the subject of the request.42/ The explanation, of course, for these cases of misidentification is that many surnames are identical or similar and that many individuals who are the subject of criminal history record checks use aliases. Partly for this reason, some state criminal history record statutes and the SEARCH standards prohibit the release of rap sheet data to otherwise authorized non-criminal justice agencies except on the basis of fingerprint comparison.

By contrast, when a member of the public seeks access to a source document, the chance of obtaining information about the wrong individual is minimal. A requestor cannot obtain information from a source document

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42/ SEARCH, FBI Study, supra at 57, note 31.

unless the requestor already knows a good deal about the record subject. For example, a requestor must know the agency or court with which the record subject had contact; the requestor must know at least the approximate dates on which the contact occurred; and often times, the requestor must know the docket number or other identification number under which the event is recorded.

Not surprisingly, the courts have had no trouble finding that privacy type interests are implicated when the government takes action on the basis of information about the wrong person.43/

43/ For example, in McCollan v. Tate, 575 F.2d 509, 511 (5th Cir. 1978), the Fifth Circuit held that an individual arrested on the basis of a misidentification by a sheriff's office may have a basis for a Section 1983, false imprisonment action.

CONCLUSION

For all of the reasons set forth above, the Amicus Parties urge the Court to reverse the court of appeals and to find that a federal agency's assertion of Exemption 7(C) to withhold criminal history records is not compromised because some of the component parts of the record are publicly available at their source; and further to find that the public availability of criminal history records threatens significant privacy interests.

Respectfully submitted,

Robert R. Belair
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Attorney for SEARCH Group, Inc.

APPENDICES

A. Letters of Consent to the Filing of the Brief *Amici Curiae*

B. Identification of *Amici Curiae*

C. Certificate of Service by Counsel of Record

APPENDIX A

Letters of Consent to the Filing of the Brief Amici Curiae

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

June 15, 1988

Robert R. Belair, Esq.
Kirkpatrick & Lockhart
South Lobby - 9th Floor
1800 M Street, N.W.
Washington, D.C. 20036-5891

Re: Department of Justice v. Reporters' Committee for Freedom of the Press, No. 87-1379

Dear Mr. Belair:

I hereby consent to the filing of a brief amicus curiae in the above case on behalf of Search Group, Inc. and agencies of the States of New York and Massachusetts.

Sincerely,

Charles Fried
Solicitor General

cc: Joseph F. Spaniol, Jr., Esquire
Clerk
Supreme Court of the United States
Washington, D.C. 20543

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June 8, 1988

Robert R. Belair, Esq.
1800 M Street, N.W.
Washington, D.C. 20036

Re: United States Department of Justice v. Reporters Committee for Freedom of the Press, No. 87-1379

Dear Mr. Belair:

This letter will serve to confirm that Respondents in the above-captioned case consent to the filing of an amicus curiae brief on behalf of Search Group, Inc. I would appreciate it if you would serve us by hand when you file your brief.

Very truly yours,

Paul Mogin

Paul Mogin

PM/kdd

APPENDIX B

Identification of Amici Curiae

IDENTIFICATION OF THE AMICI CURIAE

SEARCH Group, Inc. ("SEARCH") was established in 1974 and is a not-for-profit corporation organized under the laws of the State of California. SEARCH is governed by a Membership Group comprised of governors' appointees from each state. In most cases, the appointees are responsible for the operation of the agencies in their states which collect, maintain and disseminate, as authorized, criminal history records and related identification information. Generally these agencies are referred to as "criminal history record repositories".

The Division of Criminal Justice Services of the State of New York is responsible for operating New York's criminal history record repository. As part of this responsibility, the Division is charged, among other things, with ensuring that only "qualified agencies" have access to information held by New York's criminal history record repository. N.Y. Executive Law § 837(6) (McKinney, 1982). Moreover, Section 837(8) of the New York Executive Law imposes on the Division a duty to "adopt appropriate measures to assure the security and privacy of [criminal history record information]." Under New York law, it could be unlawful for a state official to disclose criminal history records to any agency or person, for any purpose not authorized by law.

The Kentucky Justice Cabinet, through the Department of State Police, is responsible for

the direct control and supervision of the centralized Criminal History Record Information System in the Commonwealth of Kentucky. Kentucky law bars the state police from allowing public inspection of centralized criminal history records. K.R.S. 17.150 0(4).

Don Edwards (D. Calif.) is a Member of Congress and Chairman of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary. As the chairman of the subcommittee with oversignt and legislative responsibilites for the Federal Bureau of Investigation on matters involving criminal history records, he is vitally interested in protecting the privacy interests of the subjects of criminal history records held by the FBI.

APPENDIX C

Certificate of Service by Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that I have caused three copies of the foregoing Brief of Amici Curiae SEARCH Group, Inc., the State of New York, Division of Criminal Justice Services, the Commonwealth of Kentucky, Justice Cabinet, and United States Congressman Don Edwards to be served by first class mail postage prepaid upon:

Counsel of Record for
Petitioner United States
Department of Justice
Charles Fried
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Counsel of Record for
Respondent Reporter Committee
for Freedom of the Press
Kevin T. Baines
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839 17th Street, N.W.
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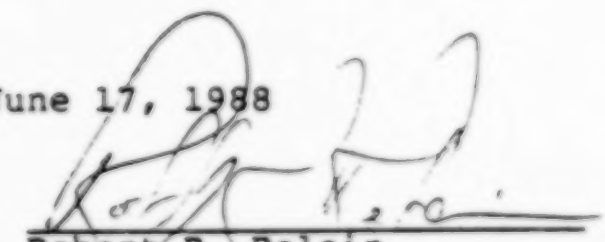
on or before June 17, 1988



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